SUPREME COURT, U.S.

DEC 26 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 958

IRMA C. CUNDICK,
Petitioner,

vs.

J. R. BROADBENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	PAGE
Opinions below	1
Jurisdiction of this Court	2
Questions presented	2
Constitutional provisions and Statutes involved	3
Statement	3
Basis for federal jurisdiction	4
Reasons for granting the writ	4
Conclusion	9
Appendix A—Opinions below (including dissent)	A-1
Appendix B—Judgments below	B-1

CITATIONS

Cases:

Ainsley v. CIR (3rd Cir.) 217 F.2d 252	5
Becker v. Miller (2nd Cir.), 7 F.2d 293; app. dis. 269 U.S. 596, 46 S.Ct. 105	5
Browning v. Crouse (10th Cir.), 356 F.2d 178, cert. den. 384 U.S. 973, 86 S.Ct. 1864	5
Cain v. Grosshans & Petersen, Inc. (Kan.), 389 P.2d 839	5
Dean v. Southern Ry. Co. (6th Cir.), 327 F.2d 757	8
Dexter v. Hall, 82 U.S. 73, 15 Wall 9	2, 6
DeVas v. Noble (Utah), 369 P.2d 290	5
Frederick v. Younger Van Lines (N. Mex.), 393 P.2d 438	5
Gaines v. City of New Orleans, 73 U.S. 642, 6 Wall 642, 18 L.Ed. 950	8
In re Williams Will (N. Mex.), 376 P.2d 3	5
Joseph v. Downers Grove (7th Cir.), 104 F.2d 974, cert. den. 308 U.S. 605, 60 S.Ct. 142	5
Lilienthal's Tobacco v. U.S., 97 U.S. 237, 24 L.Ed. 901	7, 8
Lorbeer v. Weatherby (Kan.), 376 P.2d 926	5
Nicholas v. Davis (10th Cir.), 204 F.2d 200	5

INDEX (Continued)

	PAGE
NLRB v. Ray Smith Transport Co. (5th Cir.), 193 F.2d 142	5
Potucek v. Cordeleria Lourdes (10th Cir.) 310 F.2d 527, cert. den. 372 U.S. 930, 83 S.Ct. 875	5
Rapid Transit Co. v. U.S. (10th Cir.), 295 F.2d 465	5
Roth Office Equipment Co. v. Gallagher (6th Cir.), 172 F.2d 452	5
Ruffini v. Avara (Colo.), 220 P.2d 355	5
Skinner v. Parnell (10th Cir.), 257 F.2d 345	8
Spillers v. Colby (Okla.), 391 P.2d 895	5
Stafos v. Missouri Pacific (10th Cir.), 367 F.2d 314	5
Twentieth Century Fox v. Dieckhaus (8th Cir.), 153 F.2d 893	5
Twing v. Schott (Wyo.), 338 P.2d 839	5
Washington v. Houston Lumber Co. (10th Cir.), 310 F.2d 881	5
Encyclopedias	
21 C.J.S. 343	6

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Irma C. Cundick, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on September 14, 1967.

CITATIONS TO OPINIONS BELOW

The District Court for the District of Wyoming did not issue an opinion. The opinion of the Circuit Court of Appeals (including Dissent) (R-8) is printed in Appendix A hereto. It has been reported in 383 F.2d 157.

JURISDICTION OF THIS COURT

The judgment of the Circuit Court of Appeals was given and entered on September 14, 1967 (R-9). Rehearing was denied on October 27, 1967. (R-11). A copy of the judgment of the Distrcit Court which was issued and filed on November 19, 1967, a copy of the judgment of the Circuit Court of Appeals, and the orders denying Petition for rehearing and suggestion for rehearing en banc, issued and filed, are printed in Appendix B hereto. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The following questions result from the decision of the Tenth Circuit in this case, which decision is in conflict with decisions of other Circuits, decisions of the Supreme Court, former decisions of the Tenth Circuit and State Court decisions in these respects:

1. Whether the Tenth Circuit is correct in abandoning the previously established law to the effect that undisputed, uncontradicted, positive, clear, plausible, unbiased, competent, credible, unimpeached testimony coming from more than one witness, relative to the critical issue, must control the decision?

2. Whether the Tenth Circuit is correct in refusing to follow the holding of *Dexter v. Hall*, 82 U.S. 83, 15 Wall 9, that a contract by an insane person or one non compos mentis is void and incapable of ratification?

3. Whether the Tenth Circuit is correct in imposing on Plaintiff, in a matter in which the critical issue is the question of the competency of a person at the time of making a contract, a new and greater standard of proof than that required in other civil cases?

4. Whether the Tenth Circuit is correct in changing the previously established legal proposition to the effect that the trial court is in no better position to evaluate deposition testimony than is the appellate court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions or statutes directly involved.

STATEMENT

This was an action for rescission of a contract brought by the Seller, Darwin A. Cundick, through Irma C. Cundick, Guardian Ad Litem, against the Buyer, J. R. Broadbent. Subsequent to the institution of the appeal to the Circuit Court, and on motion of Irma C. Cundick suggesting on the record the death of Darwin A. Cundick on May 30, 1966 as a result of a self-inflicted gun shot, Irma C. Cundick was substituted for the original Plaintiff as Appellant (R-2, 3).

Prior to bringing the action, Cundick requested rescission of the contract and offered to return to Respondent all monies received under it. Respondent denied the request. In this action, Cundick sought (1) a declaration that the contract was void ab initio and that the parties be restored to their former status, or (2) a declaration that the contract be rescinded and Cundick be restored to his property.

The action is based upon two grounds, either of which is sufficient within itself to sustain the action:

(1) Darwin A. Cundick lacked the legal capacity to enter into it. He lacked the ability to understand the obligations undertaken or the rights conferred.

(2) Darwin A. Cundick was of weak mind and Respondent over-reached him, dealt with him unfairly, subjected him to constructive fraud and induced him to enter an unconscionable contract for an inadequate consideration.

The answer of the Respondent (1) denied the mental incapacity and weakmindedness and incompetency of Darwin A. Cundick, (2) denied the unfairness of the contract, and (3) set up defenses of estoppel and ratification.

The consideration to be paid by Respondent under the contract for personal and real property involved in the ranch business sale was about $150,000.00. Its value according to the evidence was up to $330,000.00.

The *only* medical testimony before the court concerning the mental capacity of Darwin Cundick to understand the obligations undertaken or the rights conferred by this contract when he entered into it in September 1963 was given by three medical doctors (two by deposition) and by one psychologist. This testimony was to the effect that Cundick did *not* have the mental capacity to understand the obligations undertaken or the rights conferred by this contract when he entered into it in September 1963. They stated that their examinations reflected that he was suffering from damage to the brain which began in 1961 and which became progressively worse with the passage of time. There was no other evidence relative to Cundick's mental capacity at the time of the contract.

In a split decision (Judges Murrah and Breitenstein against Judge Hill), the U. S. Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of the U. S. District Court for the District of Wyoming which dismissed the complaint and cause. A petition for rehearing and suggestion for rehearing en banc was denied.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction over this matter in the court of first instance, the United States District Court for the District of Wyoming, is pursuant to 28 U.S.C. Section 1332 inasmuch as Plaintiff was a citizen of the State of Wyoming and Defendant was a citizen of the State of Utah and the matter in controversy exceeded the sum or value of $10,000.00, exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

1. The majority opinion of the Tenth Circuit abandons the previously established law that undisputed, un-

contradicted, positive, clear, plausible, unbiased, competent, credible, unimpeached testimony, coming from more than one witness, relative to the critical issue, must control the decision. *Stafos vs. Missouri Pacific* (10th Cir.), 367 F. 2d 314; *Browning vs. Croush* (10th Cir.) 356 F. 2d 178, Cert. den. 384 U.S. 973, 86 S.Ct. 1864; *Potucek vs. Cordeleria Lourdes* (10th Cir.), 310 F. 2d 527, cert. den. 372 U.S. 930, 83 S.Ct. 875; *Nicholas vs. Davis* (10th Cir.), 204 F. 2d 200; *Rapid Transit Co. vs. U.S.* (10th Cir.), 295 F.2d 465; *Washington vs. Houston Lumber Co.* (10th Cir.), 310 F.2d 881; *NLRB vs. Ray Smith Transport Co.* (5th Cir.), 193 F.2d 142; *Ainsley vs. CIR* (3rd Cir.), 217 F.2d 252; *Roth Office Equipment Co. vs. Gallagher* (6th Cir.), 172 F. 2d 452; *Becker vs. Miller* (2nd Cir.), 7 F. 2d 293, app. dis., 269 U.S. 596, 46 S. Ct. 105; *Twentieth Century Fox vs. Dieckhaus* (8th Cir.) 153 F. 2d 893; *Joseph vs. Downers Grove* (7th Cir.), 104 F. 2d 974, cert. den. 308 U.S. 605, 60 S. Ct. 142; *Lorbeer vs. Weatherby* (Kan.), 376 P. 2d 926; *Cain vs. Grosshans & Petersen, Inc.*, (Kan.), 389 P. 2d 839; *In re Williams Will* (N. Mex.), 376 P. 2d 3; *Frederick vs. Younger Van Lines* (N. Mex.), 393 P. 2d 438; *Spillers vs. Colby* (Okla.), 391 P. 2d 895; *DeVas vs. Noble* (Utah), 369 P. 2d 290; *Twing vs. Schott* (Wyo.), 338 P. 2d 839.

The dissenting opinion of Judge Hill properly and convincingly analyzes the status of the evidence in this case and the treatment of it by the trial court and by the majority opinion. As stated in the dissenting opinion, the trial judge should be reversed for failure to follow the cases in the Tenth Circuit which established this legal proposition. (p. A 13 Infra).

As pointed out in the dissenting opinion (p. A 14 Infra), the majority opinion is contrary to the law of the State of Colorado (one of the states within the Tenth Circuit), as said law was established in a "strikingly similar case." *Ruffini v. Avara* (Colo.), 220 P. 2d 355.

If the holding of the Tenth Circuit in this case is allowed to stand, a new criteria will have been established

by which decisions can be made by the trial courts without a scintilla of supporting evidence. This is in conflict with the decisions of other Circuits, decisions of State Courts, and with former decisions of the Tenth Circuit.

2. In the majority opinion (p. A3 Infra), the Tenth Circuit Court indicated that the law as established by the U.S Supreme Court in the case of *Dexter v. Hall*, 82 U.S. 73, 15 Wall 9, to the effect that a contract by an insane person or one non compos mentis was void and incapable of ratification, was "tended away from" by some textbook writers and some courts. It then proceeded to decide this case contrary to the Supreme Court established law. It is respectfully submitted that the law established by the U.S. Supreme Court should be controlling upon the Circuit Court and the trial court, and that the same should be changed only by the Supreme Court (21 *C.J.S.* 343 and numerous cases cited thereunder).

If this holding is allowed to stand, the Tenth Circuit's position in this respect will be contrary to that enunciated by the Supreme Court.

3. The majority opinion when first filed on September 14, 1967, contained the statement that, "As applied to the critical issue of incompetency, this finding leads us to the conclusion reached by the trial judge that when the medical testimony, positive as it may be, is considered in the context of all that was said and done, it does not carry the *heavy burden of conclusively proving* that Cundick was incompetent***" (emphasis supplied) (R-7).

On October 12, 1967, and after the petition for rehearing was filed on September 29, 1967, a new page was substituted in the original opinion (R-8) which eliminated the word "conclusively". The opinion still refers to the burden of proof by Petitioner as "heavy" (p. A 10 Infra). The burden to have been properly borne by Petitioner in this, as in other civil cases, should have been only that of establishing the necessary elements by a "preponderance of the

evidence." *Lilienthal's Tobacco v. U.S.*, 97 U.S., 237, 24L. Ed. 901.

Also, the majority opinion is based on a "silent record". It criticizes the record (1) for failing to reflect something "said or done about a mental condition" to or by Cundick's family physician from December 1960 when the physician sent him to a psychiatrist, until March 1964 (p. A6 Infra) and (2) for failure to reflect "discussion of his mental condition among his family and friends in the community". (p. A9 Infra).

The unimpeached and uncontradicted evidence of Cundick's incompetency at the time of the contract, presented by Petitioner through testimony of four medical experts and supported by two lay witnesses, was sufficient to carry the burden and to require rebuttal without further inquiry of the family, physician or friends of Cundick. It is noted that inquiry or examination of these witnesses or of any other friends or relatives concerning discussions between them about Cundick's condition (as suggested by the majority opinion) would have been improper and objectionable as hearsay and without proper or possible foundation. Nevertheless, the majority opinion here considered this lack of testimony as positive evidence concerning Cundick's mental condition.

There was no material evidence before the court to counter the admittedly unimpeached and uncontradicted evidence of Cundick's mental condition at the time of the contract. The references in the majority opinion to counter the evidence of Cundick's incompetency are not only "trivial and inconsequential" as said in the dissenting opinion (p. A 11 Infra), but in fact most of it is not supported by the record and none of it is directed to Cundick's competency at the time of the contract.

To contend that negative evidence or a "silent record" is proper evidence to controvert direct, clear, positive, unimpeached evidence is to place an improper burden on the ap-

pellant—one far beyond previously established legal precedent. *Gaines v. City of New Orleans*, 73 U.S. 642, 6 Wall 642, 18 L.Ed. 950; *Dean v. Southern Ry Co.* (6th Cir.), 327 F. 2d 757; *Lilienthal's Tobacco v. U.S.*, 97 U.S. 237, 24 L. Ed 901.

The substitution of a new page in the opinion which eliminates the word "conclusive" may be a sufficient departure from accepted and usual procedure as to warrant concern; but, in any event, the original language of the opinion coupled with reliance on the "silent record" reflects that the minds of the two majority judges were conditioned to a false standard of proof on the issue of incompetency. The resulting decision sets precedent for a new and greater standard of proof on this issue than that required in other civil cases. This conflicts with former decisions of the Tenth Circuit and with decisions of other circuits.

4. The majority opinion changes the previously established legal proposition to the effect that the trial court is in no better position to evaluate deposition testimony than is the appellate court. In its majority opinion (p. A 7 Infra) the court said that the "trial judge who heard and saw the witnesses and felt the pulse beat of the lawsuit is, to be sure, the first and best judge of the weight and value to be given to *all* the evidence both expert and non-expert" (emphasis supplied). This is a radical change in the previously established legal proposition to the effect that the trial court is in no better position to evaluate deposition testimony than is the appellate court. *Skinner v. Parnell* (10th Cir.), 257 F. 2d 345. Much of the testimony in this case was by deposition. To say that the trial judge is the best judge of *all* of the evidence indicates that the majority opinion is based on an improper reliance on the manner in which the trial judge "felt the pulse beat" of the lawsuit rather than on considerable evidence which was no more subject to a feel of "pulse beat" by the trial court than by an appellate court and which evidence is plain, unimpeached and uncontroverted.

Again if this holding is allowed to stand, it will be in conflict with former decisions of the Tenth Circuit and with decisions of many other courts.

CONCLUSION

The widespread change in established law which results from the majority opinion is so serious and important as to make the issues here presented far transcend the interests of the particular facts and parties involved and to take them into the realm of important public interest.

For the reasons herein contained, this petition for a writ of certiorari should be granted. In fact, the action of the lower court is so improper and so contrary to settled law and prior decisions of this court that summary reversal is appropriate in this case.

Respectfully submitted,

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December 1967.